Supreme Court, U.S.
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80-638

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Respondent,

vs.

JERRY SEIDMAN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 11(e)(4) Federal Rules of Criminal Procedure, when the District Court rejected a plea agreement under Rule 11(e)(1)(b) it was error not to advise the Defendant that the Court was not bound by the plea agreement and further failing to advise the Defendant that if he persisted in his guilty plea, the disposition of the case could be less favorable than that comtemplated by the plea agreement.

2. Whether the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Gartner,* 593 F.2d 775, (7th Cir., 1975), in conflict with an earlier decision of the Sixth Circuit in *United States* v. *White,* 583 F.2d 819 (6th Cir., 1978), should be reversed by this court in order to carry out the express provisions of Rule 11(e)(4) of the Federal Rules of Criminal Procedure.

3. Whether weight or deference should be given by federal courts to the formally expressed comments of the committee appointed by the United States Supreme Court to adopt Rules of Federal Criminal Procedure.

4. Whether weight or deference should be given by federal courts to the standards of judicial conduct with regard to criminal procedure adopted by the American Bar Association and relied upon by the commmittee in drafting proposed Rules of Federal Criminal Procedure.

5. Whether retroactive application should be made to the amendment to Rule 11(e) of the Federal Rules of Criminal Procedure effective August 1, 1979, to a proceeding and sentence that took place in May, 1979.

6. Whether in the plea-bargaining process a defendant who relies upon a recommendation by the prosecution is afforded essential fairness under Rule 11(e)(4) when the District Court upon rejecting the recommendation does not offer the defendant an opportunity to withdraw his pleas of guilty.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

UNITED STATES OF AMERICA,

Respondent,

vs.

JERRY SEIDMAN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Jerry Seidman respectfully prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Seventh Circuit entered August 22, 1980 which affirmed the decision of the District Court and entered judgment against the petitioner.

PARTIES

The caption of the case contains the names of all parties.

OPINIONS BELOW

The opinion of the District Court is reported in 483 F.Supp. 156 (D.C. Wisc., January 15, 1980).

The action of the Court of Appeals for the Seventh Circuit is an unpublished order in accordance with Circuit Rule 35 not being reported and is contained in the Appendix attached hereto.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered August 22, 1980. No rehearing was requested. The statutory provision which confers jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C., Sec. 1254(1).

This case involves Rule 11(e)(1), (2), (3) and (4) of the Federal Rules of Criminal Procedure. See Appendix p. 11a-12a

REASONS FOR GRANTING WRIT

1. Review is necessary to resolve the conflicts among the Circuit Courts of Appeal concerning the meaning of Rule 11(e)(4) of the Federal Rules of Criminal Procedure.

2. Review is necessary to establish the weight to be given by federal courts to the comments of the committee appointed to adopt Federal Rules of Criminal Procedure and the Standards of Judicial Conduct formulated by the American Bar Association.

3. Review is necessary as an exercise of the supervisory power of this Court over the duties of distric Courts imposed by the Federal Rules of Criminal Procedure.

4. Review is necessary to establish the extent to which a defendant in a criminal case may rely upon his understanding of a recommendation by a prosecutor.

5. Review is necessary to establish the applicability of an amendment to the Federal Rules of Criminal Procedure in the disposition of a proceeding had and a sentence imposed before the date of the amendment.

STATEMENT OF THE CASE

Defendant, Jerry Seidman, appeals from an order entered in the Eastern District of Wisconsin by the Honorable Robert W. Warren, denying defendant's motion pursuant to Rule 32(d) of the Federal Rules of

Criminal Procedure to set aside his sentence and conviction and to permit him to withdraw his pleas of guilty. Defendant also appeals from the denial of his alternative motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure for a reduction of his sentence to permit work release.

On September 5, 1978, defendant and five co-defendants were indicted in Case No. 78-CR-116 in the Eastern District of Wisconsin. Counts 3 through 137 of the indictment charged defendant with shipping regulated and non-exempt commodities interstate without a certificate of public convenience and necessity issued by the Interstate Commerce Commission in violation of Title 49, United States Code, Sections 306(a) and 322(a) and Title 18, United States Code, Section 2. The district court previously, in Case No. Misc. 653, entered an order upon defendant and his co-defendants to show cause why they should not be held in criminal contempt of court under Title 18, United States Code, Section 401(3). Defendant was charged there with 35 counts of violation of a February 13, 1976, injunction order restraining the defendants from transporting regulated and non-exempt commodities without a certificate of public convenience and necessity in violation of the Interstate Commerce Act. The matters were consolidated for disposition.

On May 17, 1979, the defendant entered pleas of guilty on Counts 3 through 137 in Case No. 78-CR-116 and admitted the allegations of contempt in Counts 1 and 2 of Case No. Misc. 653. Defendant also waived indictment and entered a plea of *nolo contendere* to a subsequent one-count information charging him with mail fraud in violation of Title 18, United States Code, Sections 2 and 1341. Judgments were entered on the pleas.

On the same day as the pleas were taken, the defendant was sentenced to six months imprisonment on Count 1 of the contempt case, followed by a two-year period of probation. On Count 2 in that case, defendant was fined $90,000. In Case No. 78-CR-116 he was fined a total of $13,500 and was given a $1,000 fine on the mail fraud charge.

STATEMENT OF THE FACTS

Defendant Jerry Seidman was charged by indictment with 135 counts of shipping regulated and non-exempt commodities in interstate commerce without a certificate of public convenience and necessity issued by the Interstate Commerce Commission (Indictment, Case No. 78-CR-116, pp. 5-95). A related contempt case was consolidated with the criminal case for disposition. The order to show cause issued in the contempt action charged defendant with 35 violations of a district court order enjoining defendant from transporting commodities without a certificate of public convenience and necessity in violation of the Interstate Commerce Act.

Pursuant to a plea agreement negotiated by defendant's trial attorney and the Assistant United States Attorney assigned to the case, defendant agreed to change his plea from not guilty to guilty on all 135 counts of violations of the Interstate Commerce Act and to admit the allegations of contempt in Counts I and II of the order to show cause. The government agreed to dismiss the remaining counts in the contempt case (Tr., May 17, 1979, p. 6). The government further agreed to recommend a total fine of $100,000 and to recommend a sentence of no more than six months imprisonment to be served on a work release basis.

In accordance with this plea agreement, defendant appeared before the district court on May 17, 1979, to enter a change of plea. Defendant entered plea of guilty to counts 3 through 137 of the indictment in Case No. 78-CR-116 and admitted the allegations of contempt in two counts of the order to show cause. An unnumbered one-count information charging defendant with mail fraud was also considered at that time, to which defendant waived indictment and entered a plea of *nolo contendere.*

Before accepting the pleas, the court requested counsel to inform it of the terms of the plea agreement. Counsel informed the court that in return for a plea of guilty the government would recommend a fine of $100,000 'in total", and six months incarceration, and if the court saw fit to impose a prison sentence "that it be imposed under a system which will allow Mr. Seidman to continue his employment and that he be confined during his non-working hours."

The court then discussed the consequences of the pleas with defendant. The court did not tell the defendant that the court was not bound to accept the terms of the plea agreement. After accepting the pleas and entering judgments thereon, but before sentencing, the Assistant United States Attorney reiterated the terms of the plea agreement (Tr., May 17, 1979, pp. 84-86). The court did not tell the defendant that the court would reject the plea agreement in whole or in part. The court thereafter sentenced defendant to six months imprisonment on Count I of the contempt case, followed by a two-year period of probation. The court rejected the government's recommendation to impose a work release sentence. On Count II of the contempt case, defendant was fined $90,000. In Case No. 78-CR-116, defen-

dant was fined a total of $13,500, and he was given a $1,000 fine on the mail fraud charge to which a plea of no contest had been accepted (Tr., May 17, 1979, p. 94, 97).

Subsequent to the imposition of the sentence, defendant obtained a substitution of attorneys. On July 26, 1979, defendant filed a motion in the district court requesting an order pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure to set aside his judgments of conviction and to permit him to withdraw his pleas of guilty and proceed to trial. As a basis for his motion, defendant cited the district court's failure to advise him in conformity with Rule 11(e)(4) after the plea agreement had been made known to the court. At no time during the hearing did the court afford the defendant the opportunity to withdraw his pleas. The court did not inform the defendant that the court was not bound by the plea agreement and that if the defendant persisted in his guilty pleas the disposition of the case might be less favorable to the defendant than contemplated in the plea agreement. Attached to the motion was defendant's affidavit in which he swore it was his understanding the court would follow the plea agreement and any sentence of imprisonment would be accompanied by a provision of work release. On September 11, 1979, defendant also filed an alternative motion pursuant to Rule 35, seeking a reduction in his sentence to a work release sentence if the court denied the motion to set aside sentence, conviction, and to permit withdrawal of the pleas of guilty.

On January 5, 1980, the district court filed a memorandum and entered an order denying defendant's motion to set aside his judgment of conviction and to permit withdrawal of his guilty pleas. In its memorandum opinion, the court acknowledged the conflicts in the fed-

eral circuits on the issues raised by defendant's motion (Memorandum and Order January 15, 1980, (Appendix p. 4a) The court agreed that, if bound by the Sixth Circuit's opinion in *United States* v. *White* (6th Cir., 1978), 583 F.2d 819, it would be required to set aside the judgment of conviction. However, the court stated it was compelled by the holding in *United States* v. *Gaertner* (7th Cir., 1979), 593 F.2d 775, to deny defendant's motion (Memorandum and Order, January 15, 1980.) Although defendant did not seek a ruling on his alternative motion for reduction of sentence at that time, the district court did include in its final order of January 15, 1980, a denial of defendant's motion for reduction of sentence.

Jurisdiction of the district court was based on indictments and information under the following statutory provisions: Title 49 of United States Criminal Code, Sections 306(a) and 323(a)(2), Title 18, United States Code Section 2 and 401(3), and (3) Title 18 United States Code Sections 2 and 134.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT RULING IN NOT AFFORDING DEFENDANT AN OPPORTUNITY TO WITHDRAW HIS GUILTY PLEAS PURSUANT TO RULE 11(e)(4) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WHEN THE COURT DECLINED TO ACCEPT THE GOVERNMENT'S SENTENCE RECOMMENDATION WHICH WAS MADE AS PART OF A RULE (11)(e)(1)(B) PLEA AGREEMENT.

The disposition of this cause requires an interpretation of Rule 11 of the Federal Rules of Criminal Procedure. Rule 11(e)(4) states:

> "Rejection of Plea Agreements. If the court rejects the plea agreement, the court shall, on the record, *inform the parties of this fact, advise the defendant personally* in open court or, on a showing of good cause, in camera, *that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea,* and *advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.*" (Ehphasis added).

Defendant urges that Rule 11(e)(4) imposes a mandatory requirement on federal courts to advise the parties to a plea agreement in compliance with the rule when the recommended sentence of the government is rejected by the court. The rule further requires that the court afford a defendant in this situation the opportunity to withdraw any plea which was premised on the plea bargain. Defendant's rights under Rule 11(e)(4) were denied when

the district court neither advised him the recommended sentence would be rejected nor advised him that if he persisted in his guilty pleas the disposition of the case might be less favorable to him than that contemplated by the plea agreement.

The pleas of guilty were given as part of a total negotiated plea agreement with the government. The defendant agreed to plead guilty to 135 counts of the criminal indictment charging violations of the Interstate Commerce Act and to admit the allegations of contempt in Counts 1 and 2 of the order to show cause. For its part of the bargain the government agreed to dismiss the remaining counts of the contempt case, to recommend a total fine of $100,000, and to recommend a prison sentence of no more than six months to be served on a work release basis. The district court accepted the plea agreement to the extent it allowed the defendant to plead guilty to the charges agreed upon by the parties and refused to permit defendant to serve his six-month sentence on a work release basis.

The defendant was not told before sentencing that the government's recommended sentence, hence the plea agreement, would be rejected. This was error. In a post-sentence motion, the defendant moved to set aside his sentence and conviction and to allow withdrawal of the pleas of guilty and proceed to trial because of this error. This motion was denied. The Circuit Court of Appeals affirmed this ruling. Because of the prejudice resulting to the defendant from the district court's failure to comply with Rule 11(e)(4), the district court's decision should be reversed with instructions allowing defendant to replead.

II.

THE CIRCUIT COURT OF APPEALS DECISION IS BASED ON AN ERRONEOUS CONSTRUCTION OF THE PROVISIONS OF RULE 11(e).

Until 1975, when this court amended Rule 11 of the Federal Rules of Criminal Procedure, Rule 11 was silent on the subject of plea agreements (Pub. L. 94-64, effective December 1, 1975). This amendment creating a plea agreement procedure followed this court's decision in *Santobello* v. *New York,* (1971, 404 U.S. 257), a case arising out of the New York state courts. The court there vacated a judgment entered on the defendant's guilty plea, because the state had recommended a sentence contrary to the plea agreement negotiated by the parties. The case was remanded so the state court could consider whether the defendant should be allowed to withdraw his plea and proceed to trial or whether the plea agreement should be specifically enforced. In its opinion, the court stressed the importance of allowing and encouraging guilty pleas, whether negotiated or not, as an essential tool for judicial administration. This requires pleas to be obtained in complete fairness. The subsequent amendment to Rule 11(e) was intended to provide a framework within which guilty pleas could be negotiated and accepted in substantial fairness to the criminal defendant.

Rule 11(e)(1) provides for three types of plea agreements under the heading "Plea Agreement Procedure". As part of a plea agreement the government attorney, may:

> "(A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence *with the understanding* that such recom-

mendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case." (emphasis supplied)

The Language of 11(e)(1)(B) requires "the understanding", presumably not only of the government attorney, but also by the defendant. The failure of the district court to establish that such understanding existed on the part of the defendant is a clear violation of Rule 11(e)(1)(B).

In this instance, the government entered into a type (e)(1)(B) agreement and agreed to recommend a work release sentence. While the trial court was under no obligation to accept any plea (*United States ex rel. Culbreath* v. *Rundle* 3rd Cir., 1972, 466 F.2d 730) it was mandated to follow the Rule and establish that an understanding existed on the part of the defendant that his plea was at his own jeopardy.

The plea agreement procedure set out in Rule 11(e) does not attempt to define criteria for the acceptance or rejection of a plea agreement (*United States* v. *Bean* (5th Cir., 1977, 564 F.2d 700). However, the Rules specifically define the steps the court must take once it decides to accept or reject a guilty plea and establish that each provision of the Rule has been complied with. Cases involving the application of Rule 11 have repeatedly required literal compliance with the technical provisions of the rule. (See *McCarthy* v. *United States* (1969), 394 U.S. 459; *United States* v. *Fels* (7th Cir., 1979, 599 F.2d 142; *Keel* v. *United States* (5th Cir., 1978, 572 F.2d 1135). Compliance includes establishing the terms of the bargain, and whether it has been carried out with the understanding of its non-binding nature required by the Rule.

Since the 1975 amendment to Rule 11, several federal circuits have considered the question of whether Rule 11 (e)(4) "Rejection of Plea Agreement", is applicable when the sentencing judge rejects a sentence recommendation made as part of a Rule 11(e)(1)(B) plea agreement. The decisions have resulted in a split of the judicial circuits on this question, including this court's decision in *United States* v. *Gaertner* (7th Cir., 1979, 593 F.2d 775). The *Gaertner* case was originally decided on February 16, 1979, by unreported order not to be cited pursuant to Circuit Rule 35(b)(2)(iv). It was later issued by the court as *per curiam* opinion. It first appeared in the Federal Reporter Advance Sheets of May 7, 1979. In *United States* v. *White* (6th Cir., 1978, 583 F.2d 819), a case which is directly on point with the instant case, the court stated the question before it as follows:

> "The question is now presented whether the district court, having rejected a non-binding sentencing recommendation made pursuant to subparagraph (1)(B), must not only inform the defendant that the court is not bound by the plea agreement, and advise the defendant that if he persists in his guilty plea the disposition of the case may be less favorable than that contemplated by the plea agreement, as was done in this case, but must also afford the defendant an opportunity to withdraw his guilty plea."

The court reached this decision:

> "We hold, therefore, that where a district court does not accept a Rule 11(e)(1)(B) plea agreement in accordance with Rule 11(e)(3), it has rejected the plea agreement, and the defendant must be afforded an opportunity to withdraw his guilty plea in accordance with Rule 11(e)(4)."
> (582 F.2d at 824-24)

In a thorough and well written opinion, the *White* court reviewed the decisions of other circuits that have reached opposite conclusions and rejected these as contrary to the clear intention of the rule. After examining the interrelationship of the paragraphs in Rule 11(3), the court concluded:

> "If the court rejects the sentencing recommendation it must comply with the requirement of Paragraph (4) and inform the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw his guilty plea, and inform him that if he persists in his plea of guilty, the disposition of the case may be less favorable to him than that contemplated by the plea agreement."

Accord *United States* v. *Hull* (E.D. Tenn., 1976), 413 F.Supp. 145.

In so doing, the Sixth Circuit rejected the result reached by the Fourth Circuit in *United States* v. *Savage* (4th Cir., 1977), 565 F.2d 1119, Cert. Denied, 435 U.S. 955. In both *Savage* and *Henderson* the courts concluded that when a defendant bargains only for a recommendation by the government, and if the government complies with the agreement by simply making the recommendation, the defendant has been given all that he bargained for. Nonacceptance of the recommendation by the trial court would not then be a rejection of the plea agreement under Rule 11(e)(4). (Accord: *United States* v. *Sarubbi* (D.C., N.J., 1976), 416 F.Supp. 633; see also *United States* v. *Futeral* (4th Cir., 1975) 539 F.2d 329.

This conclusion fails to conform to the clear intention of Rule 11(e)(4). As effectively pointed out by the court in *White*:

> "Paragraph (1) of Rule 11(e) provides for three different plea agreements. There is not indication in Rule 11 itself, in its Legislative history, or in the

Notes of the Advisory Committee on the Rules of Criminal Procedure, that paragraphs (3) and (4) are to apply to only (1)(C) agreements while, presumably, the other paragraphs of Rule 11(e) are to apply to all paragraph (1) agreements. If such a result had been intended by the Supreme Court which submitted the Rules to Congress, or by Congress, which passed them with amendments, it should be clear from the face of the Rule, and should not be inferred. For example, subparagraph (1)(A) provides that the government will move for dismissal of other charges against the defendant in exchange of his guilty plea. But a court does not accept a (1)(A) plea agreement within the meaning of paragraph (3) simply by allowing the government to move for the dismissal of other charges against the defendant. To accept the agreement the court must grant the motion. If the court denies the motion, it has rejected the plea agreement and the defendant should then be allowed to withdraw his guilty plea and proceed to trial. Similarly, where the parties have entered into a (1)(B) plea agreement, the court does not accept the agreement within the meaning of paragraph (3) when it allows the parties to make a sentencing recommendation or request but imposes a different, more severe sentence." (583 F.2d at 826).

The language in Rule 11(e) simply makes no distinction among a type (e)(1)(A), (B) or (C) plea agreement for purposes of applying the requirements of paragraph (e)(4). All three types of agreements are included under the general heading "Plea Agreement Procedure". The rejection of a recommended sentence as part of an (e)(1)(B) plea agreement is the "Rejection of a Plea Agreement" and subject to the provisions of paragraphs (e)(4). The classification employed in the rule admits of no other construction. It was acknowledged by the court in *White* "that this result tends to blur the distinction between (1)(B) and (1)(C) plea agreements * * *, this re-

sult is however, compelled by the Rule itself." (583 F.2d at 826, fn. 10.) The clear and unambiguous language of the rule precludes the judicial interpretation engaged in by the Circuit Court of Appeals in *Gaertner*.

Cited in support of the *White* opinion are the Notes of the Advisory Committee on Rules of Criminal Procedure. The notes of the Advisory Committee are analogous to the report of a congressional committee in determining the intent of the framers. (*United States* v. *Mihalopoulos* (D.C.D.C. 1964), 118 F.Supp. 994).

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JERRY SEIDMAN,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
Nos. 78-CR-116 and Misc. 653
Robert W. Warren, Judge

Argued June 4, 1980 — Decided August 22, 1980

Before FAIRCHILD, *Chief Judge,* CUMMINGS, *Circuit Judge,* and ROBERT A. GRANT, *Senior District Judge* of the Northern District of Indiana sitting by designation.

Unpublished Order
Not to be cited per circuit Rule 35

ORDER

This is a case in which the defendant asks to have his guilty plea set aside because the sentencing judge imposed a sentence harsher than that recommended by the government pursuant to the plea agreement. Finding no error, we affirm the judgment of conviction.

As a part of its plea agreement with the defendant the government agreed to recommend that any sentence of

imprisonment imposed should be no longer than six months, to be served on a work-release basis, and that any fines imposed should total no more than $100,000. In fact the defendant was sentenced to six months imprisonment with no work release and received fines totalling $104,500. The defendant does not dispute that the agreement was of the type described in Rule 11(e)(1)(B)[1] and was therefore not binding on the court. The only question is whether, when the sentencing judge refused to follow the recommendation, he was required by Rule 11(e)(4) to give the defendant a chance to withdraw his plea.

We have previously decided this precise question, holding that the provisions of 11(e)(4) do not apply to cases where the government has agreed only to recommend a particular sentence. *U. S.* v. *Gaertner,* 593 F.2d 775 (7th Cir. 1979). Three other circuits have reached the identical conclusion. *U. S.* v. *Incrovato,* 611 F.2d 5 (1st Cir. 1979); *U. S.* v. *Henderson,* 565 F.2d 1119 (9th Cir.

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[1] Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure provide as follows:

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

* * * * * * *

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court. . . .

1977); *U. S.* v. *Savage*, 561 F.2d 554 (4th Cir. 1977). In addition, Rule 11 has recently been amended so that it is now clear (with regard to pleas taken after August 1, 1979) that the defendant does not have the right to withdraw the plea if the government's recommendation is not followed.[2] Nevertheless the defendant urges us to overrule *Gaertner* and adopt the contrary conclusion of the Sixth Circuit, as expressed in *U. S.* v. *White*, 583 F.2d 819 (6th Cir. 1978). Having considered the defendant's arguments, we decline the invitation to overrule *Gaertner*. It follows, therefore, that the district court was under no obligation to give the defendant the opportunity to withdraw his plea when it decided not to adopt the government's recommendation.

Although his affidavit makes it clear that the defendant expected the court to follow the government's recommendation, the district court order states that the defendant had been given notice that the court was not to be bound by the recommended sentence and the defendant does not assert otherwise. We have no reason to believe that the plea was not voluntarily made or that the requirements of Rule 11 were not followed. Therefore we affirm the judgment appealed from.[3]

---

[2] The amendment adds the following language to Rule 11(e)(2):

> "If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea."

[3] Apparently as an afterthought, the last sentence of the defendant's brief asks us, as an alternative, to vacate the sentence and remand the case for consideration of additional medical evidence. That motion is more appropriately addressed to the sound discretion of the district court.

UNITED STATES OF AMERICA,

Plaintiff,

v.

JERRY SEIDMAN,

Defendant.

United States District Court,
E. D. Wisconsin.

Jan. 15, 1980.

Joseph P. Stadtmueller, Asst. U.S. Atty., Milwaukee, Wis., for plaintiff.

Abraham W. Brussell, Epton, Mullin, Segal & Druth, Ltd., Chicago, Ill., for defendant.

MEMORANDUM AND ORDER

WARREN, *District Judge.*

Defendant, Jerry Seidman, has filed two motions seeking to change the sentence imposed in the above-referenced cases. First, based upon alleged violations by the Court of defendant's rights under Rule 11(d) and 11(e)(4) of the Federal Rules of Criminal Procedure, defendant has moved for an order setting aside his sentence and for leave to withdraw his guilty plea. Second, Mr. Seidman, relying on Rule 35 of the Federal Rules of Criminal Procedure, has moved for a reduction of his sentence to permit work release if his motion to set aside the sentence is denied.

In his motion seeking to set aside the judgment of conviction based upon the Court's purported noncompliance with Rule 11(d) of the Federal Rules of Criminal Procedure, Mr. Seidman concedes that the Court complied with the first sentence of Rule 11(d) but alleges that the Court failed to meet the requirements set out in the

second sentence of the rule. The second sentence of Rule 11(d) provides:

> The Court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

It is the government's contention that the Court's obligation under that sentence was met during the hearing on the change of plea and sentence. Contrary to defendant's assertions, the Court would note that during the proceedings held on May 17, 1979, the prior discussions between Court and counsel indicate compliance with the second sentence of Rule 11(d). (Transcript of Proceedings of May 17, 1979 at 47.) Therefore, defendant's motion to set aside the sentence under Rule 11(d) must be denied.

The second portion of defendant's motion seeking the Court to set aside the sentence imposed upon defendant Jerry Seidman is somewhat more complex than the Rule 11(d) motion. Defendant claims that when the Court failed to follow the government's sentencing recommendation, it was required under Rule 11(e)(4) of the Federal Rules of Criminal Procedure to permit defendant Jerry Seidman to withdraw his plea of guilty. Rule 11(e)(4) provides:

> (4) Rejection of a Plea Agreement.
>
> If the Court rejects the plea agreement, the Court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the Court is not bound by the plea agreement, afford the defen-

> dant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of his case may be less favorable to the defendant than that contemplated by the plea agreement.

Citing *United States* v. *White,* 583 F.2d 819 (6th Cir. 1978), defendant claims that, under the circumstances in the present case, he should have been given leave to withdraw his plea of guilty when the Court decided that it was not going to follow the government's sentencing recommendations.

Although this case is somewhat more complex than the normal case in that both corporate and personal defendants were involved and the criminal charges arise out of indictments and contempt charges, the Court nevertheless finds the nature of the agreement clear and straightforward. Under Rule 11(e)(1) of the Federal Rules of Criminal Procedure, there are three different types of plea agreements. Specifically, Rule 11(e)(1) provides:

> The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view towards reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (a) move for dismissal of other charges; or
>
> (b) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such

recommendation or request shall not be binding upon the court; or

(c) agree that a specific sentence is the appropriate disposition of the case.

The Court shall not participate in any such discussions.

The plea agreement in the present case involves elements of both subpart (A) and subpart (B) of Rule 11(e)(1). As to paragraph (a), the plea agreement called for dismissal of counts 3 through 35 of the petition for an order to show cause in Misc. 653. The government's motion was granted. The second part of the plea agreement called for the government to recommend a sentence and fine. This plea agreement is, of course, the type set forth in Rule 11(e)(1)(B). The Court did not follow the right, under Rule 11(e)(4), to withdraw his guilty Jerry Seidman, claims that he should have been given the government's recommendation and the defendant, plea as to counts 1 and 2 of the offenses charged in Misc. 653.

In *United States* v. *White, supra,* the Sixth Circuit Court of Appeals held that in those cases where a Rule 11(e)(1)(B) type plea agreement is entered into between the government and the defendant, the Court is bound to follow the procedure set forth in Rule 11(e)(4) of the Federal Rules of Criminal Procedure. Several courts take a contrary view holding that when a district judge fails to follow the government's recommendation on sentencing, he is not rejecting the plea agreement, and therefore, the defendant is not entitled to the right to withdraw his guilty plea under the provisions of Rule 11(e)(4). *United States* v. *Henderson,* 565 F.2d 1119 (9th Cir.

1977); *United States* v. *Savage,* 561 F.2d 554 (4th Cir. 1977); *United States* v. *Sarubbi,* 416 F.Supp. 633, 636 (D.N.J. 1976). In *United States* v. *Gaertner,* 593 F.2d 775 (7th Cir. 1979), the court held that a "district court's nonacceptance of the government's sentence recommendation (does) not constitute a rejection of the plea agreement under Rule 11(e)(4), where the [defendant] plea bargained merely for a sentence recommendation, rather than [a] disposition, knew that the recommendation would not be binding upon the trial court, and the government presented the recommendation in accordance with the plea agreement." *Id.* at 777. The question in the present case, then, is whether the defendant "bargained merely for a sentence recommendation, rather than the disposition. . . ."

In an affidavit, defendant Jerry Seidman represents to the Court that he "entered pleas of guilty to the captioned cases based upon [his] understanding that if the judge sentenced [him] to prison it would not be for more than six months and that [he] would have the opportunity to work during the day for eight hours during this period of time." He further claims that he "was never informed by [his] attorney that if the judge was not going to follow the recommendation of the prosecutor, he would tell [him] before the sentencing so that [he] would have the opportunity to withdraw [his] plea." Arguably, such a representation by defendant Jerry Seidman in an affidavit indicates that he was not fully cognizant of the plea agreement or that a Rule 11(e)(1)(B) type plea agreement had been entered into. The government's position on this issue is that they entered into a type (b) plea agreement and no other kind. Furthermore, they desire leave to question the attorneys who repre-

sented the defendant Jerry Seidman at the sentencing so that those attorneys can substantiate the government's claim. The Court feels that the record is sufficiently clear in the present case such that defendant's attorney's recollections are unimportant.

Notwithstanding the Court's holding in *United States* v. *White, supra,* which if binding upon this Court would require that the sentence be set aside even if this were a Rule 11(e)(1)(B) plea agreement, the Court is bound by the holding in *United States* v. *Gaertner, supra,* and will follow that opinion. Nevertheless, even under the *Gaertner* reasoning, the Court must find that defendant, Jerry Seidman, had entered into a type (b) plea agreement. In other words, the Court must determine, based upon the records in this case, that defendant, Jerry Seidman, was aware that the Court would not be bound by the government's recommendation.

[1, 2] At the outset, the Court would note that it never will accept a Rule 11(e)(1)(C) type plea agreement. It is this Court's prerogative to determine the type of sentence that should be imposed upon a defendant for the offense of which he or she has been adjudged guilty. Furthermore, the record in this case indicates that the defendant, Jerry Seidman, knew that the agreement provided that the government's sentencing recommendation was not binding upon this Court. As reflected by a letter dated January 2, 1979, defendant's counsel acknowledges that this was the type of plea agreement entered into. At the end of the first paragraph in the January 2, 1979, letter, Attorney Stephen M. Glynn states, "It is understood by all parties that the Court has not participated in the formulation of this plea bargain and is not bind-

ing itself to impose any specific sentence." A copy of this letter was sent to defendant, Jerry Seidman. Such a letter accurately reflects the type of plea agreement entered into between the defendant and his attorneys. It is also important to note that, during the course of the sentencing held before the Court on May 17, 1979, neither defendant nor his attorneys raised any objection to the Court's imposition of a sentence more severe than that recommended by the government at the time of sentencing. These factors reflect that a Rule 11(e)(1)(B) type plea agreement was entered into and therefore, under the authority of *Gaertner*, the provisions of Rule 11(e)(4) are not applicable.

Thus, the Court is not bound to permit the defendant, Jerry Seidman, at this time, to withdraw his plea of guilty to counts 1 and 2 of the petition for an order to show cause in Misc. 653. Therefore, defendant's motion for an order to set aside the judgment of conviction and for leave to withdraw his guilty plea must be denied.

[3] Having denied defendant's motion to set aside his plea, the Court must turn to his motion for work release.

While this Court looks very favorably upon the work release procedure imposed in those criminal cases where the defendant will be incarcerated for less than one year, this type of sentence is not invariably granted. By permitting an incarcerated defendant to work while he is in jail, a defendant can continue to earn a living. Even though the Court looks favorably upon granting requests for work release, where it is otherwise warranted in the case by the type of offense charged and the length of incarceration, the Court nevertheless is extremely careful in granting work release.

Having considered the defendant's motion for a reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure to permit the defendant's work release during the time he will be incarcerated, the Court finds that such a request is inappropriate in the present case due to the nature of the offense. Therefore, defendant's request for work release must be and hereby is DENIED.

In summary, defendant's motion to set aside the sentence imposed in this case must be and hereby is DENIED. It is further ordered that defendant's motion for a reduction of sentence to permit him work release must be and hereby is DENIED.

RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

(e) Plea Agreement Procedure

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of Plea Agreement. If the court accepts the plea agreement the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of Plea Agreement. If the court rejects the plea agreement the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or on a showing of good cause, in camera, that the court is not bound by the plea agreement afford the defendant the opportunity to then withdraw his plea and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial as may be fixed by the court.